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Nos. 87-821, 87-827 and 87-1095

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

PITTSTON COAL GROUP, *et al.*,

Petitioners,

v.

JAMES SEBBEN, *et al.*,

Respondents.

ANN MCLAUGHLIN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Petitioners,

v.

JAMES SEBBEN, *et al.*,

Respondents.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Petitioners,

v.

CHARLIE BROYLES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FOURTH CIRCUITS

BRIEF FOR THE PETITIONERS PITTSTON COAL GROUP, BARNES AND TUCKER COMPANY, ISLAND CREEK COAL COMPANY, CONSOLIDATION COAL COMPANY, OLD REPUBLIC INSURANCE COMPANY AND PENNSYLVANIA NATIONAL INSURANCE GROUP

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QUESTIONS PRESENTED

1. Does the United States Department of Labor's black lung eligibility presumption published at 20 C.F.R. § 727.203 (1987) violate section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), because it contains certain evidentiary rules that are less favorable to black lung claimants than the Social Security Administration's black lung eligibility presumption published at 20 C.F.R. § 410.490 (1987).

2. If 30 U.S.C. § 902(f)(2) requires application of the Social Security Administration presumption in claims involving the individual liability of coal mine operators, does 30 U.S.C. § 902(f)(2) violate the due process of law guarantees of the Fifth Amendment to the United States Constitution.

3. If 30 U.S.C. § 902(f)(2) requires the Secretary of Labor to adopt the Social Security Administration rule and passes constitutional muster, does 28 U.S.C. § 1361 confer jurisdiction on the United States courts to require the Secretary of Labor to reopen and readjudicate tens of thousands of previously denied claims otherwise barred by the Longshore Act and res judicata.

LIST OF PARTIES AND RULE 28.1 STATEMENT

Numbers 87-821 and 87-827 arise out of a suit for class certification and mandamus filed in the United States District Court for the Southern District of Iowa. James Sebben, John Cossolotto, Bruno Lenzini and Charles Tonelli were the plaintiffs and purported class representatives in the district court and appellants in the Eighth Circuit. Each plaintiff was an applicant for benefits under the Black Lung Benefits Act. Ann McLaughlin is the Secretary of Labor; Steve Breeskin is an employee of the United States Department of Labor having certain administrative responsibilities in connection with the black lung program. Secretary McLaughlin and Mr. Breeskin were defendants in the district court and appellees in the court of appeals.

In the Eighth Circuit, the Pittston Coal Group, Barnes and Tucker Company, Island Creek Coal Company, Consolidation Coal Company, Old Republic Insurance Company and the Pennsylvania National Insurance Group sought and were granted leave to intervene as indispensable parties on the side of the federal parties.

Intervenors are the petitioners in No. 87-821 and the Department of Labor officials are the petitioners in No. 87-827.

In No. 87-1095, Charlie Broyles and Lisa Kay Colley are separate claimants for benefits under the Black Lung Benefits Act. Both were petitioners in the Fourth Circuit seeking relief from denials of benefits in prior administrative proceedings. The Director, Office of Workers' Compensation Programs, United States Department of Labor, defended both claims on behalf of the Black Lung Disability Trust Fund and was the respondent in the Fourth Circuit. The Director is the petitioner in this Court.

The Barnes and Tucker Company and the Pennsylvania National Insurance Group are independent corporate entities without relationships that must be listed under Rule 28.1 of the Rules of the United States Supreme Court. The Pittston Coal Group is a wholly owned subsidiary of the Pittston Companies. The Island Creek Coal Company is a wholly owned subsidiary of the Occidental Petroleum Corporation. The Consolidation Coal

Company is a wholly owned subsidiary of the E.I. du Pont de Nemours & Company. The Old Republic Insurance Company is a wholly owned subsidiary of the Old Republic International Corporation.

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BRIEF FOR THE PETITIONERS PITTSTON COAL GROUP AND CO-PETITIONERS

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 815 F.2d 475 (Pet. App. 1a).[1] The Eighth Circuit's orders denying rehearing are unreported (Pet. App. 17a-18a). The orders of the Eighth Circuit granting intervention are unreported (Pet. App. 19a-20a). The district court's order granting the Government's motion to dismiss for lack of subject matter jurisdiction is unreported (Pet. App. 21a).

1. The Solicitor General's motion to dispense with the printing of the joint appendix in Nos. 87-821 and 87-827 was granted on March 21, 1988. Citations to the Petitioners' Appendix ("Pet. App.") in this Brief refer to the Appendix to the Petition for Writ of Certiorari filed by the Pittston Coal Group and its co-petitioners in No. 87-821.

The opinion of the Fourth Circuit is reported at 824 F.2d 327 (Broyles App. 1a).[2] The Fourth Circuit's order denying rehearing is unreported (Broyles App. 29a). The decisions of the Benefits Review Board, United States Department of Labor, and of the administrative law judge are unreported (Broyles App. 7a-28a).

JURISDICTION

In Nos. 87-821 and 87-827, the decision of the Eighth Circuit was filed on March 25, 1987. Timely petitions for rehearing filed by the Government and on behalf of intervenors were denied on June 25, 1987 (Pet. App. 17a) and July 24, 1987 (Pet. App. 18a), respectively. On September 17, 1987, Justice Blackmun signed orders extending the time for both the Government and intervenors to file a petition for a writ of certiorari to and including November 20, 1987 (Pet. App. 24a).

In No. 87-1095, the decision of the Fourth Circuit was filed on July 31, 1987 (Broyles App. 1a). A timely petition for rehearing was denied on September 30, 1987 (Broyles App. 29a). Jurisdiction was conferred on the Fourth Circuit by the filing of a timely petition for review of a decision of the Benefits Review Board, United States Department of Labor, in accordance with 33 U.S.C. § 921(c), *incorporated into* 30 U.S.C. § 932(a).

The jurisdiction of this Court is invoked in these cases under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The following authorities are printed in the Petitioners' Appendix:

1. U.S. Const. amend. V (Pet. App. 25a)
2. 5 U.S.C. § 553 (Pet. App. 25a)
3. 30 U.S.C. § 902(f) (Pet. App. 27a)

2. The Solicitor General's motion to dispense with the printing of the joint appendix in No. 87-1095 was granted on May 2, 1988. Citations to the Broyles Appendix ("Broyles App.") in this Brief refer to the Appendix to the Petition for Writ of Certiorari filed by the Solicitor General in No. 87-1095.

4. 30 U.S.C. § 932(a) (Pet. App. 28a)
5. 33 U.S.C. § 919 (Pet. App. 29a)
6. 33 U.S.C. § 921 (Pet. App. 31a)
7. 20 C.F.R. § 410.490 (1987), The Social Security Administration "Interim Presumption" (Pet. App. 34a)
8. 20 C.F.R. § 727.203 (1987), The Department of Labor "Interim Presumption" (Pet. App. 37a)

STATEMENT OF THE CASE

A. Introduction

More than 424,000[3] claims filed under the Black Lung Benefits Act,[4] 30 U.S.C. §§ 901-945 (1982) ("the Act"), have been adjudicated by the U.S. Secretary of Labor under a comprehensive benefit eligibility regulation called the "interim presumption," 20 C.F.R. § 727.203 (1987). Approximately 155,000[5] of these claims were denied after adjudication and are now closed, while some 9,600[6] remain pending.

There are two versions of the "interim presumption": one promulgated by the Social Security Administration ("SSA") in 1972 at 20 C.F.R. § 410.490 (1987), and one adopted by the Secretary of Labor in 1978 at 20 C.F.R. § 727.203. The two

3. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 7, 102, 186 (1981) (prepared statements of Morton E. Henig, U.S. General Accounting Office; Sam Church, Jr., President, United Mine Workers of America; Charles Coakley, Counsel, American Insurance Association) *("1981 Oversight Hearings")*.

4. Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, the Black Lung Benefits Amendments of 1981, 95 Stat. 1643, the Black Lung Benefits Revenue Act of 1981, 95 Stat. 1635, Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a),(d), 100 Stat. 312, 313, and Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203, § 10503.

5. *1981 Oversight Hearings, supra* note 3.

6. Solicitor General's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in No. 87-1095 at 11.

versions are similar, but not identical. Black lung claims within SSA's jurisdiction were considered only under section 410.490, and claims within the Labor Department's jurisdiction were considered only under section 727.203.

The United States Court of Appeals for the Eighth Circuit directed the Secretary of Labor to reopen all previously denied and closed Labor Department claims and readjudicate them under the SSA interim presumption. *Sebben* v. *Brock*, 815 F.2d 475 (8th Cir. 1987). The United States Court of Appeals for the Fourth Circuit held that still pending claims also are to be considered under the SSA interim presumption. *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987). This Court has consolidated the two cases. 108 S. Ct. 1288 (1988).

The potential combined impact of these decisions is staggering. The cost of readjudication alone is sure to be hundreds of millions of dollars. The cost to the U.S. coal industry and its insurers in added benefits payable will reach into billions of dollars, virtually all of which liability is unfunded and unanticipated.[7]

The Pittston Coal Group and its co-petitioners seek reversal of the holdings below in both *Sebben* and *Broyles*, and the restoration of order in the federal black lung program.

B. Background of the Black Lung Benefits Program

The Black Lung Benefits Act establishes a federal program to compensate coal miners and their families for total disability or death due to coal workers' pneumoconiosis ("black lung" disease). 30 U.S.C. § 901(a). The program is divided into two segments called "Part B," 30 U.S.C. §§ 921-925, and "Part C," 30 U.S.C. §§ 931-945. The Part B program began on December 30, 1969, and terminated for new claims on June 30, 1973.

7. *See* Brief Amici Curiae of the American Insurance Association and the National Council on Compensation Insurance in Support of the Petition for Writ of Certiorari in *Sebben* at 8-9.

Part B claims were filed with SSA and adjudicated under regulations published by the Secretary of Health, Education and Welfare ("HEW"). Benefits awarded under Part B were and continue to be paid by the U.S. Treasury from general revenues. *See Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427, 429 (1987). Part B claims are adjudicated in accordance with procedures specified in section 205 of the Social Security Act. 42 U.S.C. § 405, *incorporated into* 30 U.S.C. § 923(b).

Claims filed on or after July 1, 1973, *i.e.*, Part C claims, are filed under the workers' compensation law of the state in which the miner was employed, if that law has been approved by the Secretary of Labor. 30 U.S.C. § 931. In the absence of an approved state law,[8] the claimant may file a claim with the U.S. Department of Labor under regulations published by the Secretary of Labor. *Id.* §§ 902(f), 932, 936. Part C claims, if allowed, are paid by the mine operator that last employed the miner or by its insurance carrier, 20 C.F.R. Part 725, subpart F (1987), or by an accounting entity called the Black Lung Disability Trust Fund, 30 U.S.C. §§ 933, 934, 934a.[9] The Trust Fund is financed by a manufacturers excise tax on coal. 26 U.S.C. § 4121. If unable to meet current obligations from coal tax revenues, the Trust Fund borrows from the Treasury and is obligated to repay these amounts with interest.[10] 30 U.S.C. § 934(a)(4), (5).

8. No state's law has ever been approved under 30 U.S.C. § 931.

9. The Trust Fund is responsible for the payment of claims predicated upon coal mine employment terminated prior to January 1, 1970, 30 U.S.C. § 932(c), or where no responsible mine owner can be identified, or if the identified mine owner refuses to pay the claim, 30 U.S.C. § 934(a). The Trust Fund also pays all administrative expenses of the black lung program, 30 U.S.C. § 934(a)(5), and the attorney fees of counsel representing claimants paid by the Trust Fund. *See, e.g., Republic Steel Corp.* v. *United States Dep't of Labor*, 590 F.2d 77 (3d Cir. 1978).

10. As of September 1987, the Trust Fund owed almost $3 billion to the Treasury. U.S. Dep't of Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Sept. 30, 1987). Four additional supplemental requests for borrowing authority have been made thus far in fiscal year 1988.

Part C also incorporates by reference the claims procedures and several other provisions affecting the rights and duties of employers contained in the Longshore Act. 33 U.S.C. §§ 901-952 (Supp. IV 1987), *incorporated in parts into* 30 U.S.C. § 932(a). The Longshore Act is a federal workers' compensation law for persons engaged in maritime employment. Longshore Act procedures contemplate an Administrative Procedure Act ("APA") trial, 5 U.S.C. § 554, *incorporated into* 33 U.S.C. § 919(d), an administrative appeal to the Department of Labor's Benefits Review Board and a further appeal as of right to a United States court of appeals, 33 U.S.C. § 921.

Part B and Part C are fundamentally different in both statutory design and intent. Part B was intended to be a unique remedial measure to compensate miners unable to obtain workers' compensation benefits under state laws. It was not intended to be a workers' compensation law. *See* H.R. Rep. No. 460, 92d Cong., 2d Sess., pt. 1, at 5-7 (1971); *Hearing on H.R. 18, H.R. 42, H.R. 43 and H.R. 5702 Before the General Subcomm. on Labor of the House Comm. on Education and Labor* 56-58 (1971). Part C was intended to either facilitate the integration of the federal program into existing state workers' compensation laws or to function like, and in lieu of, a state workers' compensation program.[11] *See* H.R. Rep. No. 460, *supra*, at 26-28; S. Rep. No. 209, 95th Cong., 1st Sess. 13-14 (1977) (stating it was "intended that traditional workers' compensation principles . . . be included within [Part C] regulations"); *see also Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 397 (7th Cir. 1987).

C. Background of the Interim Presumptions

The original Act delegated exclusive authority to write medical eligibility rules for both Part B and Part C claims to the Secretary

11. Section 224 of the Social Security Act, 42 U.S.C. § 424a(2)(A), requires the reduction of social security disability insurance benefits by workers' compensation benefits paid to the SSDI beneficiary. For purposes of section 224, Part C benefits are deemed workers' compensation benefits but Part B benefits are not. 30 U.S.C. § 922(b).

of HEW.[12] During the second year of the Part B program Congress became dissatisfied with SSA's claims approval rate, and for that and other reasons amended the Act in several significant respects[13] in the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972) (codified in scattered sections of 30 U.S.C.).

The Senate Committee on Labor and Public Welfare, responding to SSA testimony concerning the unexpectedly large volume of claims filed and the paucity of certain medical testing facilities in coal mining areas, included in its Report special instructions for SSA.

> The backlog of claims which have been filed under [Part B of the Act] . . . cannot await the establishment of new facilities or the development of new medical procedures. They must be handled under present circumstances in the light of limited medical resources and techniques.
>
> Accordingly, the Committee expects the Secretary [of HEW] to adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of these Amendments. Such interim rules and criteria shall give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claim [sic] on the basis of medical evidence other than breathing tests when it is not feasible or practicable to provide physical performance tests of the type described [by HEW].

12. *See* Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, §§ 402(f), 411, 83 Stat. 793 (1969). The Secretary of Labor believed he had no authority to write medical eligibility standards and so informed Congress. H.R. Rep. No. 151, 95th Cong., 1st Sess. 15-19 (1977), *reprinted in* House Comm. on Education and Labor, 96th Cong., 1st & 2d Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* 508, 522-26 (Comm. Print 1979) ("*1977 Legislative History*").

13. Among other things, the 1972 amendments delayed the start of the Part C program for eighteen months, Pub. L. No. 92-303, § 5, 86 Stat. 155, prohibited the denial of a claim solely on the basis of a single negative chest x-ray, added a new eligibility presumption for certain long-term coal miners and liberalized the statutory definition of the term "total disability." *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 27-36 (1976).

S. Rep. No. 743, 92d Cong., 2d Sess. 18-19, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2305, 2322-23.

After enactment, SSA published a regulation entitled *Interim Adjudicatory Rules for Certain Part B Claims filed by a Miner Before July 1, 1973, or by a Survivor of a Miner Where the Miner Died Before January 1, 1974.* 20 C.F.R. § 410.490. Section 410.490 could not be applied in Part C claims, which were to be considered under an alternative set of SSA regulations, 20 C.F.R. §§ 410.401-.476.[14]

The Labor Department's black lung program began in late 1973, and within a few years it became clear that Labor's approval rate was well below that of SSA. Responding to congressional inquiry, the Labor Department identified the inapplicability of the interim presumption as a significant reason for its lower approval rate and asked SSA to revise its rules to make the presumption applicable in Part C claims. *Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 49 (1977) *("1977 Senate Hearings"); Hearings on H.R. 3476, H.R. 8834, H.R. 8835, and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st & 2d Sess. 329, 341, 349, 399 (1973-1974). HEW's general counsel refused this request, suggesting that the presumption was designed to increase the speed and frequency of SSA awards without regard to the validity of the claim and thus could not be constitutionally applied in Part C's adversary setting or to the private liabilities of mine owners.[15]

The debate then moved to Congress. There was essentially no scientific testimony that section 410.490 established a medically valid formula for determining total disability or death due to black lung disease. To the contrary, two SSA staff physicians

14. The Department of Labor adopted the SSA provisions, excluding section 410.490. 20 C.F.R. § 718.2, 38 Fed. Reg. 16,965 (1978) (repealed 1978).

15. *See* H.R. Rep. No. 151, *supra* note 12; P. Barth, *The Tragedy of Black Lung: Federal Compensation for Occupational Disease* 85-91 (1987).

testified that the medical criteria reflected in the rule were scientifically invalid, and that SSA lawyers wrote section 410.490 to eliminate the agency's backlog, erring on the side of an award.[16] Labor Department witnesses echoed SSA's views and sought authority to write scientifically supportable eligibility rules.[17] The Comptroller General of the United States reported that SSA's rule produced large numbers of unsubstantiated awards.[18] This report concluded that any effort to make the SSA interim presumption applicable to Part C claims should also direct the Labor Department to substantiate entitlement by medical evidence.

The House passed a bill requiring application of criteria "not more restrictive than" SSA criteria in Part C claims. H.R. 4544, 95th Cong., 1st Sess. § 7(a) (1977). The Senate bill authorized the Secretary of Labor to write new Part C eligibility criteria. S. 1538, 95th Cong., 1st Sess. § 2 (1977). The compromise bill conformed to the Senate version, but also provided:

> Criteria applied by the Secretary of Labor in the case of . . .[certain categories of claims filed prior to publication of Labor's new regulations] shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

16. *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 274-75 (1977) (testimony of Dr. Harold I. Passes, Former Acting Chief Medical Officer, Bureau of Hearings and Appeals, SSA) *("1977 House Hearings"); 1977 Senate Hearings, supra* p. 8, at 193-95 (testimony of Dr. Herbert Blumenfeld, Chief, Medical Consulting Staff, Bureau of Disability Insurance, SSA).

17. *1977 Senate Hearings, supra* p. 8, at 154; *1977 House Hearings, supra* note 16, at 241 (testimony of Donald Elisburg, Assistant Secretary of Labor).

18. Comptroller General of the United States, *Report to the Senate Comm. on Human Resources: Program to Pay Black Lung Benefits to Coal Miners and Their Survivors—Improvements Are Needed* 43-47, 52 (1977), *reprinted in 1977 Senate Hearings, supra* p. 8, at 316-20, 325.

30 U.S.C. § 902(f)(2).[19] The conferees cautioned the Labor Secretary that SSA's history of making unsubstantiated awards was not to be repeated and instructed the Secretary to write a regulation no more restrictive than those applicable to a claim filed on June 30, 1973, "*except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the Federal Register.*" H.R. Rep. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 309 (emphasis added).

D. The Two Presumptions Contrasted

The Secretary of Labor published an interim presumption for Part C claims on August 18, 1978. 43 Fed. Reg. 36,825 (1978). Labor's rule is unavailable unless the miner worked "at least 10 years" in coal mine employment. 20 C.F.R. § 727.203(a).[20] After proving that fact, the presumption is invoked if chest x-ray, autopsy or biopsy evidence establishes the existence of pneumoconiosis, or pulmonary function (ventilatory) tests show values meeting published standards, or arterial blood gas study results meet published standards, or medical opinion evidence establishes a totally disabling lung disease, or in the absence of medical evidence, lay testimony demonstrates a totally disabling lung disease. *Id.* § 727.203(a)(1)-(5).

Section 410.490 can be invoked only if chest x-ray, autopsy or biopsy evidence establishes pneumoconiosis, or if pulmonary function tests meet published values identical to those in section

19. In the 1977 amendments, Congress directed the Secretary of Labor to automatically reopen and reconsider all previously denied Part C claims under the more favorable eligibility rules adopted in 1978. Congress also afforded previously denied Part B claimants the opportunity to seek further review, on their own election, by either SSA or the Department of Labor, or by both agencies. 30 U.S.C. § 945(a), (b)

20. In neither Part B nor Part C does the unavailability of an interim presumption end the consideration of a claim. A claimant who cannot use the interim rule may still establish eligibility either under the statutory presumptions, 30 U.S.C. § 921(c)(1)-(5), or by direct proof of disability or death due to black lung disease, 20 C.F.R. §§ 410.490(e), 727.203(d).

727.203(a)(2). 20 C.F.R. § 410.490(b)(1)(i), (ii).[21] SSA invocation on pulmonary function scores requires either ten or fifteen years of coal mine employment.[22] *Id.* § 410.490(b)(1)(ii), (b)(3). Under section 410.490(b)(2), a miner with positive x-ray evidence may not invoke the SSA presumption unless "the impairment established in accordance with subparagraph (1) of this paragraph arose out of coal mine employment." The provision then ends with the parenthetical "(see §§ 410.416 and 410.456)." The parenthetical cross references two alternative means of establishing occupational causation of the disease—either by proof of ten years of mine employment, or by proof "necessary to establish that the pneumoconiosis arose out of employment in the Nation's coal mines (see §§ 410.110(h), (i), (j), (k), (l), and (m))." *Id.* §§ 410.416, 410.456. Although the route is circuitous, one may conclude from the language[23] that a claimant who had not worked in mining for ten years could invoke the SSA presumption on positive x-ray proof combined with proof of occupational causation.[24]

21. SSA paid benefits on the basis of arterial blood gas studies meeting published values and proof of pneumoconiosis. 20 C.F.R. Part 410 subpart D Appendix. Labor's blood gas tables are less restrictive than those used by SSA.

22. The provisions are internally inconsistent.

23. Petitioners believe, but cannot clearly demonstrate in published case law, that SSA did not permit use of section 410.490 absent ten years of coal mine employment. Sources imply that this was the case but are inconclusive. *See Maxey* v. *Califano*, 598 F.2d 874, 876 & n.3 (4th Cir. 1979); *see also* Comptroller General of the United States, *Report to the Congress: Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability* 4, 12 (1980). It is clear that persons involved with the program believed that ten or more years were required. *Hearings on H.R. 3476, H.R. 8834, H.R. 8835, and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st & 2d Sess. 353, 367, 395, 398 (prepared statement of Bedford W. Bird, Deputy Director, Department of Occupational Health, United Mine Workers' of America; testimony of John Rosenberg, Director, Appalachian Research and Defense Fund).

24. A positive chest x-ray alone is not diagnostic of black lung disease and may exhibit a lung tissue reaction due to coal dust, other dusts, smoking or other causes. Pendergrass, et al., *Roentgenological Patterns in Lung Changes that Simulate Those Found in Coal Workers' Pneumoconiosis*, 200 Annals N.Y. Acad. of Sci. 494 (1972); Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721, 730 (1981).

Thus, the medical bases for invocation in section 727.203 are as favorable or more favorable to claimants than are the SSA provisions. But, at least theoretically, SSA's rules permit some short-term coal miners to use the presumption while Labor imposes a ten-year threshold in all cases.

Rebuttal differences between the two presumptions are dramatic. The SSA rule may be rebutted if the miner is still working, or if "other evidence" shows that the miner is able to work. 20 C.F.R. § 410.490(c)(1), (2). The SSA rebuttal inquiry has nothing to do with whether black lung disease is present, or if present, whether it has any role in the miner's inability to work. Although the intricate cross references employed in the SSA rules could be construed otherwise, the circuit courts have noted "the HHS presumption cannot be rebutted by medical evidence." *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d 1182, 1185 (7th Cir. 1987). The Fourth Circuit holds, "the only way to rebut this [SSA] presumption is to show that the claimant is doing or capable of doing his coal mine work." *Broyles*, 824 F.2d at 329.

Of the one and one quarter million black lung claims filed, approximately 600,000 were processed by SSA under section 410.490. Yet, we are unable to find a single reported case in which section 410.490 was rebutted by medical proof that the miner did not have black lung disease or was not medically disabled by the disease.[25] This is astounding, but not inconsistent with Congress's perception and the Comptroller General's findings that rebuttal by SSA was not generally contemplated, and rebuttal evidence was not considered. *See supra* pp. 8-9 and note 18.

By contrast, the rebuttal language of Labor's rule requires the consideration of all relevant evidence, and provides for rebuttal if proof establishes that the miner is not totally disabled by, did not

25. The few instances in which rebuttal of the SSA rule was permitted are cases involving a miner still employed in his regular coal mine job. *See Farmer* v. *Weinberger*, 519 F.2d 627 (6th Cir. 1975). It appears that SSA attempted, on occasion, to rebut section 410.490 solely on the basis of blood gas test results but the courts rejected these attempts. *See Oliver* v. *Califano*, 476 F. Supp. 12 (D. Utah 1979); *Mutter* v. *Weinberger*, 391 F. Supp. 951 (W.D. Va. 1975).

die due to, or did not have pneumoconiosis. 20 C.F.R. § 727.203(b)(1)-(4). Although there is little uniformity among the circuits (and even within each circuit) on rebuttal rules, rebuttal of Labor's rule by disproving a presumed fact is difficult but possible.[26] Rebuttal of SSA's rule by disproving presumed medical facts is not possible.

E. Background of the Litigation

In 1982, a Third Circuit panel held that section 727.203 was more restrictive than section 410.490, and thus violated 30 U.S.C. § 902(f)(2), because the Labor rule does not afford a short-term miner the opportunity to benefit from the interim presumption. *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d 30, 31 (3d Cir. 1982). On rehearing, the Government argued that its rule does not violate 30 U.S.C. § 902(f)(2) because Congress did not direct Labor to adopt all of SSA's rule. Rather, the statute and, more importantly, its history focus only on the "medical criteria" of SSA's rule.

It is the Secretary of Labor's position that the agency was required to make the basic interim presumption available by x-ray, autopsy, or biopsy proof of pneumoconiosis, or ventilatory test values matching those used in section 410.490(b). The agency was not also required to adopt the additional evidentiary devices of section 410.490. In support of this argument, the Government points to substantial proof that Congress intended a

26. *See Wright* v. *Island Creek Coal Co.*, 824 F.2d 505 (6th Cir. 1987) (disability due to heart disease not compensable); *Kolesar* v. *Y & O Coal Co.*, 760 F.2d 728 (6th Cir. 1985) (miner too old to work, but not disabled); *Knudtson* v. *Benefits Review Board*, 782 F.2d 97, 100 (7th Cir. 1986) (presumption of pneumoconiosis rebutted by proof of no occupational disease); *Peabody Coal Co.* v. *Lowis*, 708 F.2d 266 (7th Cir. 1983) (disability due entirely to cigarette use not compensable). *But see Roberts* v. *Benefits Review Board*, 822 F.2d 636 (6th Cir. 1987) (benefits awarded for disability due to stroke). The *published* decisions of the Fourth Circuit make rebuttal all but impossible. *See Adkins* v. *United States Department of Labor*, 824 F.2d 287 (4th Cir. 1987); *Sykes* v. *Director, Office of Workers' Compensation Programs*, 812 F.2d 890 (4th Cir. 1987). Labor's rebuttal provisions are still frequently litigated in the circuit courts.

distinction between "medical criteria" and "evidentiary standards." A majority of the Third Circuit panel, over a strong dissent, was unconvinced and ordered the Secretary to readjudicate Halon's claim under section 410.490. *Halon*, 713 F.2d at 21, 25.

The Eighth Circuit followed suit and directed the Secretary to apply section 410.490 in two cases arising within that court's jurisdiction. *Coughlan* v. *Director, Office of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985). The Eighth Circuit added little to the discussion, noting only that it would not defer to the Secretary's regulation. *Id.* at 968.

The issue was addressed by the Seventh Circuit in *Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395 (7th Cir. 1987). This panel disagreed with the Third and Eighth Circuits.

> From their inception in 1969, however, the Part B and Part C programs were intended to be separate and distinct. This difference was only accentuated in 1977 when Congress delegated the regulatory authority with respect to Part C claims to the Secretary of Labor while leaving the regulatory authority with respect to Part B claims with the Secretary of HEW. Until permanent Part C regulations could be promulgated, Congress mandated in § 902(f)(2) that the Part B interim medical standards be applied by the Secretary of Labor. . . . But the Secretary was not otherwise bound by the Part B rules and was free to adopt his own adjudicative criteria for processing such claims.

817 F.2d at 405-406. In reaching this conclusion, the Seventh Circuit defers to the Secretary's rule, finding no clear indication that the Secretary's interpretation of section 902(f)(2) departs from Congress's intent.[27]

27. The Seventh Circuit reiterated its holding in *Taylor* v. *Peabody Coal Co.*, 838 F.2d 227 (7th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3739 (U.S. April 15, 1988) (No. 87-1720). *Taylor* involves a miner with *more than* ten years of employment seeking the more favorable rebuttal format of section 410.490.

The Sixth Circuit then adopted the reasoning of the Third, noting that the term "criteria" in 30 U.S.C. § 902(f)(2) was generic and justified no distinction between "medical" and "nonmedical" provisions, as urged by the Labor Secretary. *Kyle* v. *Director, Office of Workers' Compensation Programs*, 819 F.2d 139, 143 (6th Cir. 1987), *petitions for cert. filed*, 56 U.S.L.W. 3643, 3484 (U.S. Dec. 21, 1987) (Nos. 87-1045, 87-1065). Judge Guy dissented, having been persuaded by Judge Weis' dissent in *Halon*. 819 F.2d at 144.[28]

The Fourth Circuit's turn came in *Broyles*. Finding the reasoning of *Halon* more persuasive than that of the Secretary, the *Broyles* panel holds that section 410.490 applies to all Labor Department claims. This panel also holds that "the only way to rebut this presumption is to show that the miner is either doing or capable of doing his usual coal mine work." *Broyles*, 824 F.2d at 329. The Third Circuit joined the Fourth in holding that the section 410.490 rebuttal provisions apply in Labor Department claims. *Sulyma* v. *Director, Office of Workers' Compensation Programs*, 827 F.2d 922 (3d Cir. 1987).

These decisions have enormously disrupted the ongoing litigation of almost ten thousand pending claims. While several hundred of these are in the circuit courts, the remainder are before the Benefits Review Board or administrative law judges

28. The Sixth Circuit's view differs from *Halon* and *Coughlan* in one important respect. The Sixth Circuit refuses to apply the rebuttal provisions of section 410.490 in claims adjudicated under section 727.203. *Prater* v. *Hite Preparation Co.*, 829 F.2d 1363 (6th Cir. 1987). Before *Kyle*, the Sixth Circuit addressed the application of section 410.490 *rebuttal* rules to section 727.203 claims, holding that 30 U.S.C. § 902(f)(2) did not "require continuation of the evidentiary rules applicable to Part B cases." *Ramey* v. *Kentland Elkhorn Coal Co.*, 755 F.2d 485, 490 (6th Cir. 1985). To distinguish *Ramey*, the *Kyle* panel held, "*Ramey* should not be read to suggest that the Part B presumptions no longer apply. On the contrary, *Ramey* should be interpreted to hold that although the Part B presumptions are preserved, under certain limited circumstances, the specific evidence necessary to rebut those presumptions may be altered over time." 819 F.2d at 144.

("ALJs").[29] *Halon* and its progeny, if upheld, will require retrial of thousands of claims.

F. Background of These Cases and Opinions Below

Sebben began in the U.S. District Court for the Southern District of Iowa as a suit for nationwide class certification and a writ of mandamus to compel the Secretary of Labor to reopen and readjudicate, under section 410.490, all previously denied and closed Part C cases. The district court granted the Secretary's motion to dismiss, holding that plaintiffs failed to exhaust administrative remedies and that the procedures specified for the adjudication of Part C black lung claims did not contemplate review in the U.S. district courts (Pet. App. 22a-23a). Further, the court found no basis on which to exercise jurisdiction under 28 U.S.C. § 1361 as the Eighth Circuit in *Coughlan* imposed no duty on the Secretary of Labor to apply section 410.490 retroactively.

On March 25, 1987, the *Sebben* court, relying on *Coughlan,* reversed the district court. Observing that the persons in the class "deserve to have their claims heard," the Eighth Circuit held that the statutory time limits prescribed for the exhaustion of administrative remedies specified in the Longshore Act are not jurisdictional and erect no barrier to the exercise of mandamus

29. The Benefits Review Board held that in all cases arising in the Third, Fourth, and Sixth Circuits (by far the majority of cases), section 410.490 must be applied in its entirety for purposes of both invocation and rebuttal. *Peyton* v. *Brown Badgett, Inc. Coal Co.*, 10 Black Lung Reporter (MB) 1-122 (Benefits Review Board 1987) (Sixth Circuit); *Shortt* v. *Westmoreland Coal Co.*, 10 Black Lung Reporter (MB) 1-127 (Benefits Review Board 1987) (Fourth Circuit); *Grieco* v. *Director, Office of Workers' Compensation Programs*, 10 Black Lung Reporter (MB) 1-139 (Benefits Review Board 1987) (Third Circuit). The Board applies SSA's rule whether or not the claim involves fewer than ten years of mine employment. *Cornelius* v. *D. W. Miller, Inc.*, 11 Black Lung Reporter (MB) 1-29 (Benefits Review Board 1988). There is, in fact, no logic to restrict section 410.490 to the claims of short-term miners. On May 2, 1988, however, the Benefits Review Board issued a decision holding section 410.490 invalid as applied in Part C claims on the ground that the rule had never been published for notice and comment as required by 5 U.S.C. § 553. *Whiteman* v. *Boyle Land and Fuel Coal Co.*, 11 Black Lung Reporter (MB)___, BRB No. 87-348 BLA (Benefits Review Board 1988). How ALJs will resolve the apparent conflict between the Board and the circuits is not yet known.

jurisdiction by the district court (Pet. App. 15a). The Eighth Circuit directed the district court to certify the class and grant a writ ordering the Secretary to readjudicate each claim within it, citing *Bowen* v. *City of New York*, 106 S. Ct. 2022 (1986). The class was to comprise all previously denied and closed claims filed between December 30, 1969 and April 1, 1980, involving a claimant who had submitted at least one positive chest x-ray, but did not work in coal mining for at least ten years (Pet. App. 16a). The Solicitor General and intervenors then filed petitions for a writ of certiorari.

Broyles involves the claims of two former coal miners, Charlie Broyles and Bill Colley. Broyles worked as a coal miner for about five years from 1946-1952 (Broyles App. 11a). Colley worked in mining for approximately nine and one-half years from 1945-1959 (Broyles App. 24a). Broyles' x-ray evidence was deemed positive by the ALJ (Broyles App. 13a). Proof of pneumoconiosis was deemed "questionable" by the ALJ in Colley's case (Broyles App. 27a).

In *Broyles,* the ALJ reviewed all of the medical evidence and, after resolving all doubt in favor of the claimant, concluded that the record was devoid of substantial proof that Broyles is totally disabled due to pneumoconiosis. No presumptions were applied in this analysis and the claim was denied (Broyles App. 16a-17a). The Benefits Review Board affirmed per curiam (Broyles App. 8a), and Broyles appealed to the Fourth Circuit.

In *Colley,* the ALJ reviewed the medical record and found most persuasive the opinions of two physicians that Colley's health problems were not due to coal mine employment. No presumptions were applied, and the claim was denied (Broyles App. 28a). The Benefits Review Board affirmed, finding the ALJ's decision supported by substantial evidence. The Board also rejected Colley's section 410.490 argument (Broyles App. 20a-21a). Colley then appealed to the Fourth Circuit, which consolidated the two cases. The Fourth Circuit followed *Halon* and reversed the Benefits Review Board in both cases. The Solicitor General filed a petition for a writ of certiorari.

SUMMARY OF ARGUMENT

These cases present several questions of significance. Primary among them is whether the Black Lung Benefits Act precludes the Secretary of Labor's discretion to design an interim presumption that requires ten years of coal mine employment for its invocation and affords employers a fair opportunity for rebuttal. The language of the Act and its history reasonably support the premise that the Labor Secretary was not compelled to merely republish the SSA rule. Indeed, Labor was directed not to do so, and could not do so in keeping with the agency's duty to preserve the rights of claim defendants to a fair hearing.

In designing its rule, Labor undertook to accommodate all competing interests and through this effort produced an entitlement standard of unprecedented liberality in civil litigation. As the rule evolved, Labor took all reasonable steps to ensure its compliance with congressional purposes, going so far as to ask the most outspoken members of Congress for written approval. Having obtained that approval, Labor published its rule, and the rule passed muster in the regulatory process. It has been applied in hundreds of thousands of claims and has delivered billions of dollars in benefits to miners and their families. The Secretary of Labor's actions accord with Congress's intent and purposes and are well within the limits of discretion. They are entitled to judicial deference. Section 727.203 is valid for these reasons.

The preference of the courts below for the SSA rule narrowly focuses on the single word—"criteria"—in the midst of thousands and fails to acknowledge the many factors that must be accorded weight in the validity equation. Moreover, were the courts below correct in deciphering Congress's purposes, the result that follows denies due process of law to mine owners. The Due Process Clause of the Fifth Amendment does not allow the imposition of private liabilities on the strength of a rule of evidence that defies reason.

The Eighth Circuit has compounded the error by mandating the retrial of tens of thousands of closed claims under the SSA rule. The Eighth Circuit has no jurisdiction to accomplish this

result. Black lung claims are litigated under incorporated provisions of the Longshore Act. The Longshore Act expressly precludes access to the district courts and it embodies the premise that final decisions in claims are in fact final. Its time limitations for pursuit of the remedies provided are mandatory and jurisdictional. They may not be waived. The *Sebben* plaintiffs have sought to bypass the Longshore Act but the Act expressly prohibits them from doing so.

Apart from the Longshore Act, res judicata is properly applied in this setting. The claimants had their day in court, and there is no valid reason to permit them to start over.

The Eighth Circuit's reliance on the mandamus statute is similarly misguided. Mandamus jurisdiction is ousted by the Longshore Act. Were that not the case, mandamus remains an improper judicial response to the issues presented. The Labor rule evolved in a complex accommodation of competing considerations. It is a complex rule and has been beset by controversy. Its promulgation was by no theory a ministerial act. This is not a case where mandamus authority, or any other theory of law, authorizes a court to dictate the result.

The decisions of both the Fourth Circuit and the Eighth Circuit are manifestly in error in all respects and should be reversed.

ARGUMENT

I.

THE SECRETARY OF LABOR'S REGULATION IS VALID AND IS THE ONLY INTERIM PRESUMPTION THAT MAY BE APPLIED IN PART C CLAIMS

A. The Act Does Not Compel the Labor Department to Use All of the SSA Rule

The fundamental question presented in *Sebben* and *Broyles* is whether section 727.203 is a valid regulation. Labor's rule is not ambiguous. It requires ten years of coal mine employment for its invocation, and it provides for the rebuttal of presumed facts. The SSA rule is, at least theoretically, available to miners with

positive chest x-rays who did not work in mining for at least ten years. Certain facts presumed by the SSA rule (*i.e.*, the presence of pneumoconiosis or a totally disabling condition connected at least in part to this occupational disease) are irrebuttable. The validity of section 727.203 turns on whether the Act authorizes these differences.[30] The starting point in the inquiry is the language of the Act. *CBS* v. *FCC*, 453 U.S. 367, 377 (1981).

Benefits are payable under the Act only if (1) the miner has pneumoconiosis, (2) the disease arose out of coal mine dust exposure (disease causation), (3) the miner has a totally disabling condition or is deceased, and (4) the totally disabling condition or death is attributable at least in part to pneumoconiosis (disability causation). 30 U.S.C. § 901(a); *see also Mullins Coal Co.*, 108 S. Ct. at 431.

Part A of the Act, 30 U.S.C. § 901-902, contains general provisions defining the Act's terms and allocating authority to the administering agencies to write benefit eligibility rules. Section 402(b) defines the term "pneumoconiosis" to mean "a chronic dust disease of the lung and its sequelae, including respiratory or pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). No special regulatory authority is allocated to Labor or SSA to define disease causation. The Act, however,

30. The Labor rule exhibits no technical defects. Section 426(a) of the Act, 30 U.S.C. § 936(a), requires the Secretary of Labor to issue regulations in conformity with 5 U.S.C. § 553. That was done here. 43 Fed. Reg. 17,770-71 (1978). More importantly, 30 U.S.C. § 936(a) and 30 U.S.C. § 902(f)(1) clearly provide that *only* the Secretary of Labor may issue regulations governing Part C claims. To simply apply SSA's rule to Department of Labor claims violates the Act. Question 3 in the Petition for a Writ of Certiorari filed by the Pittston Coal Group and its co-petitioners inquires whether the court below may simply promulgate a rule for the Department. It is axiomatic that the court has no authority to write an agency rule. *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 545 (1978). Thus, were this Court to agree with the Fourth and Eighth Circuits that section 727.203 is impermissibly restrictive, the matter must be remanded to the Secretary of Labor for rulemaking under 5 U.S.C. § 553. Because the answer to Question 3 is not dispositive, and because it goes to the remedy and not the merits, the question is not further discussed in this Brief.

permits a presumption of occupational cause if a miner has ten or more years of employment. 30 U.S.C. § 921(c)(1), (2).

The term "total disability" is defined in 30 U.S.C. § 902(f). This provision allocates regulatory authority to the Secretary of Labor to define "total disability" for Part C claims and to the Secretary of HEW to define "total disability" for Part B claims "subject to the relevant provisions of subsections (b) and (d) of section 413 [30 U.S.C. § 923(b), (d)]," 30 U.S.C. § 902(f)(1), and several other limitations listed in 30 U.S.C. § 902(f)(1)(A)-(D), (f)(2). Section 902(f)(1)(D) directs the Secretary of Labor, in collaboration with the National Institute for Occupational Safety and Health, to "establish criteria for all appropriate medical tests . . . which accurately reflect total disability in coal miners. . . ." Section 902(f)(2) directs that in all claims reopened by Congress in 30 U.S.C. § 945, and in all new claims filed before the Secretary of Labor developed new rules, "criteria applied by the Secretary of Labor shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973. . . ."

The language in section 902(f)(2), in context, submits to no easily settled meaning. Had Congress wanted Labor to apply the SSA rule without modification or elaboration, or had Congress intended to revoke the Secretary of Labor's regulatory authority to write a rule of his own design, it would have been a very simple matter to have said so. Instead, Congress enacted a fairly complex structure, leaving it to the agencies to effectuate congressional purposes in published rules.

While implications may arise from the statutory context and choice of words,[31] this is surely not a case where the words themselves speak so clearly that there is no room for agency interpretation. It is a case where resort to the legislative history is required.

31. The word "criteria" is used three times in 30 U.S.C. § 902(f). If the usages are read *in pari materia* they imply a reference to medical data or medical standards only. The reference to criteria "applicable under section 223(d) of the Social Security Act" in 30 U.S.C. § 902(f)(1)(C) is instructive. For purposes of determining an applicant's entitlement to Social Security disability insurance benefits, SSA rules employ the term "criteria" to mean medical guides for total disability. 20 C.F.R. §§ 404.1511(a), 404.1525 and Appendix 1 to Subpart P (1987). In 30 U.S.C. § 902(f)(1)(D), the term

See Chevron U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

B. The Legislative History Demonstrates that Congress Contemplated the Use of a Different Interim Presumption in Part C Claims

Fairly read, the vast legislative history of the Black Lung Benefits Reform Act of 1977 supports two conclusions: (1) that the Secretary of Labor was not required to include every provision of section 410.490 in the Labor rule, and (2) that the Secretary complies with 30 U.S.C. § 902(f)(2)—so long as the Labor rule encompasses the medical bases for invocation employed by SSA.

The original authorizing language directing SSA to adopt an interim presumption describes a two-part standard comprised of "interim evidentiary rules and disability evaluation criteria" or "interim rules and criteria." S. Rep. No. 743, *supra* p. 8 , at 2322-23. Following this format, section 410.490 contains specific disability evaluation criteria (*i.e.*, x-ray, autopsy and biopsy findings or ventilatory test scores), 20 C.F.R. § 410.490 (b)(1), and collateral evidentiary rules, *id.* § 410.490(b)(2), (b)(3), (c). The medical disability criteria give rise to the basic interim presumption of entitlement. The collateral evidentiary rules allocate and shift burdens of proof regarding disease causation and rebuttal, but contain no medical criteria.

The earliest proposals to enlarge the population of claimants who could benefit from an interim presumption extended all parts of the SSA rule to additional claims. A 1974 House proposal would have reopened Part B for six months, and would have required the adjudication of claims filed during this period "on the same basis as if filed on June 30, 1973" (the expiration date of section 410.490).[32] H.R. 17178, 93d Cong., 2d Sess. § 11 (1973). The proposal to adopt this approach generated heated controversy.

"criteria" also directly relates to "criteria for . . . medical tests." *See also Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d at 401.

32. Later proposals employed the same reopening formula. H.R. 7, 94th Cong., 1st Sess. §§ 8,11 (1975); H.R. 8, 94th Cong., 1st Sess. §§ 8, 11 (1975).

Both administering agencies and agency scientists opposed the extension of SSA's rule. *See supra* at pp. 8 - 9. Scientific witnesses representing the American Lung Association and the American Thoracic Society testified that House proposals, including extension of SSA's rules, would require awards of benefits "without regard to sound medical criteria for the determination of such disability. . . . [T]he adoption of these interim criteria would result in the determination of disability in individuals fully capable of . . . active employment." ***Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor,*** 95th Cong., 1st Sess. 259-60 (1977) (statement of Dr. Hans Weill). Although we do not know to what degree, if any, House proponents were influenced by this testimony, the final House bill settled upon application of the "criteria" of section 410.490 after June 30, 1973. H.R. 4544, 95th Cong., 1st Sess. § 7 (1977).[33]

The Senate did not extend any part of section 410.490 to claims filed after June 30, 1973. S. Rep. No. 209, 95th Cong., 1st Sess. 12-14 (1977), ***reprinted in 1977 Legislative History, supra*** note 12, at 615-17. Instead, the Senate version directed the Department of Labor to write its own eligibility rules, noting "this section does not require nor preclude the blanket incorporation of any provision now a part of existing HEW medical eligibility regulations . . . ." *Id.*

The Conference Committee accepted the Senate approach with the proviso that the Part B "medical standards" were to apply in pending and reopened claims according to regulations designed by the Secretary of Labor and published in the Federal Register. H.R. Rep. No. 864, *supra* p. 10. The Conference Report further emphasized that "all standards are to incorporate the presumptions contained in Section 411(c) of the Act [30 U.S.C. § 921(c)]." *Id.* The statutory presumptions require at least ten years of coal mine employment for their invocation.

33. The House bill proposed dramatic changes in the structure of the program. Among other things, it eliminated a mine owner's right to contest claims, yet retained the mine owner's obligation to pay approved claims. It is apparent that the House bill presented significant questions of constitutional dimension.

When the conference bill was reported back to the House and the Senate, its supporters in each chamber made two points: (1) Labor was expected to use the presumption differently than had SSA; and (2) the identity between the SSA rule and the new Labor Department rule was firm only with respect to "medical" criteria.

Senator Randolph, a conferee, emphasized that Labor was to apply the "interim medical standards" until new regulations were drafted by the Secretary of Labor. 124 Cong. Rec. 2330-31 (1978). Senator Javits, another conferee, reiterated his colleague's emphasis on Labor's obligation to use SSA's "medical criteria." *Id.* at 2333. Senator Javits added:

> The "interim" standards as they were applied to determine benefit claims under Part B, have been highly controversial and widely criticized. For example, the Secretary of Labor on September 30, 1977, stated:
>
> The Part B standards are not medically sound for providing benefits to all deserving individuals.

Id.[34]

In the House, conferees Simon and Perkins engaged in the following colloquy:

> *Mr. Simon*: Mr. Speaker, I would like to ask Chairman Perkins, who also served as chairman of the Conference Committee, if in his opinion this legislation clearly requires that all denied or pending claims subject to the review provisions of the new section 435 [30 U.S.C. § 945] will be subject to reconsideration under the so-called interim medical criteria applicable under Part B of the black lung program?
>
> *Mr. Perkins*: That is the intent of the legislation .... All claims filed before the date that the Secretary of Labor promulgates new medical standards under Part C are subject to evaluation under standards that are no more restrictive than those in effect as of June 30, 1973 .... These are the standards HEW has applied under Part B and they are the precise and only standards HEW will apply to these old claims it must review according to this legislation. As for the Labor Department, it too must apply the interim standards to all of the claims filed under Part C .... We do recognize in the joint explanatory statement that the Secretary of Labor may apply the interim standards to its Part C claims within the context of all relevant medical evidence. But there is no such direction or requirement imposed on HEW .... We expect that HEW will review these old claims according to the same interim criteria it has applied in the past.
>
> I would also add that this legislation gives no authority to the Labor Secretary to alter, adjust, or otherwise change the interim standards .... Insofar as the interim standards address medical criteria, they cannot be made more restrictive.
>
> *Mr. Simon*: ... Mr. Speaker, I am pleased that the language in this bill is crystal clear on the subject of the medical standards ....
>
> * * *
>
> It should not be possible to misconstrue the meaning of this language. The Department of Labor is required to apply medical criteria no more restrictive than criteria being used by [SSA] ....
>
> * * *
>
> So the Secretary [of Labor] is not confined to the medical evidence of the interim criteria and yet may not prescribe criteria more restrictive than the Social Security interim adjudication standards.

Id. at 3431.

Before publication of a proposed Labor Department version of the interim presumption, the draft rule was submitted by the Secretary of Labor to Representatives Perkins, Simon and Dent, the most active and vocal advocates of liberalization. A responding letter signed by the three congressmen stated:

34. Expressing concern for the solvency of the Black Lung Disability Trust Fund, Senator Javits also wanted HEW to change its practices under its interim presumption so that all Part B and Part C claims subject to review under the 1977 amendments would be treated equally. 124 Cong. Rec. 2333. Congressman Perkins wanted HEW to decide cases as it had before, recognizing that the Labor Department would do things differently. 124 Cong. Rec. 3426, 3431 (1978).

> [T]he Committee strongly supports the repromulgation of the interim standards, as found in Section 727.203(a) . . . .
>
> * * *
>
> In Section 727.203(a)(1), DOL follows the exact wording of the interim standards covering x-ray evidence . . . . If a miner-claimant has been engaged in coal mine employment for 10 years and presents an x-ray establishing the presence of pneumoconiosis . . . he may invoke the interim presumption found in Section 727.203(a)(1).

(Pet. App. 44a, 46a.) After the public notice-and-comment period expired, the Secretary of Labor in the Federal Register surveyed the comments on section 727.203 and stated, "the greatest amount of controversy in the comments received has been generated in connection with this section." 43 Fed. Reg. 36,826 (1978). Not a single comment criticized either the Secretary's ten-year requirement or the full rebuttal format provided.

Other factors also played a role in the evolution of section 727.203. Most importantly, it was accepted that disabling black lung disease is virtually unknown in miners with fewer than ten years of coal mine exposure.[35] Second, because the Part C program involves adversarial proceedings under the APA in which private liabilities are adjudicated, the Secretary of Labor had a duty to ensure an acceptable level of fairness in eligibility criteria and rules of evidence. The Secretary of Labor also had a duty to preserve some reasonable level of affordability and predictability, as the Trust Fund was clearly doomed to deficit funding. *See* S. Rep. No. 336, 95th Cong., 1st Sess. 23 (1977).

35. Available information in 1978 compiled by the National Institute for Occupational Safety and Health showed that 99.3% of miners with fewer than ten years of exposure showed no evidence of black lung disease and that these short-term miners who had the disease had its earliest stage. There is no evidence at all that short-term miners suffer the disabling stages of the disease. *1981 Oversight Hearings, supra* note 3, at 32 (attachment to statement of Dr. J. Donald Miller, Director, National Institute for Occupational Safety and Health); *see also Usery*, 428 U.S. at 7 (noting "simple pneumoconiosis ordinarily identified by x-ray opacities of a limited extent is generally regarded by physicians as seldom productive of significant respiratory impairment").

It is reasonable to conclude that the Secretary of Labor had some flexibility in designing the Labor Department rule. Repeated references to the "medical criteria" of the SSA rule and repeated acknowledgments that SSA and Labor would apply their rules differently strongly suggest that the Secretary was bound only to apply SSA's medical criteria. Congress's admonitions that the Secretary of Labor could not ignore relevant medical evidence in designing Labor's rule reflects Congress's intent to permit rebuttal of the Labor presumption. Finally, the rulemaking process itself confirms general satisfaction on the part of Congress and the public with the ten-year requirement and rebuttal provisions of section 727.203.

While not free from doubt, there is no clear proof that either Congress, any member of Congress, or anyone else contemporaneously believed that the Secretary of Labor violated the language or intent of the 1977 amendments in the design and implementation of section 727.203. Although the Third, Fourth and Eighth Circuits were unimpressed by these "ambiguous bits of legislative history," *see Coughlan*, 757 F.2d at 968, the references noted obviously conveyed a message to the Secretary that was accepted by the participants in both the legislative and rulemaking processes. The legislative record supports the validity of the Secretary of Labor's rule.[36]

36. This conclusion with reference to the ten-year requirement is predicated on the assumption that questions regarding "disease causation" in the context of the presumption are evidentiary or adjudicatory standards and not medical criteria. The Seventh Circuit is of the opinion that disease causation is not, in this context, a medical criterion. *Strike*, 817 F.2d at 404-05. This observation is supported by the fact that "disease causation" in the statute is treated entirely apart from "disability causation" or total disability. *Compare* 30 U.S.C. §§ 902(b), 921(c), 932(h) *with* 30 U.S.C. § 902(f). The SSA interim presumption also treats proof of disease causation as an evidentiary standard and not as medical criteria. One can argue that "disease causation" is a medical criterion, at least in common parlance. The Secretary of Labor's perception that disease causation was not what Congress had in mind when it directed the Secretary to adopt SSA medical criteria resolves this argument. There is a good deal of proof that the Secretary is right and no definitive evidence that his judgment is wrong.

C. The Secretary of Labor's Rule is Valid and Deserves Judicial Deference

The Act confers on the Secretary of Labor the authority to define the term "total disability" for Part C claims. 30 U.S.C. § 902(f)(1), (2). The Secretary promulgated these eligibility rules. In reviewing similar grants of authority, this Court has held "[w]here ... the statute expressly entrusts the Secretary with the responsibility for implementing a provision by regulation, our review is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious." *Bowen* v. *Yuckert*, 107 S. Ct. 2287, 2293 (1987) (quoting *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983)). This Court has consistently accorded weight to an agency's construction of its own statute and deferred to the agency's accommodation of conflicting policies "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States* v. *Shimer*, 367 U.S. 374, 383 (1961); *accord Chevron, U.S.A.*, 467 U.S. at 845. This Court's traditional test validates section 727.203.

The plain language of section 902(f) is less than clear. If, in isolation, the term "criteria" in subsection 902(f)(2) has broad general meaning, the context of the Act and particularly the whole of section 902(f) prompt further inquiry. Section 902(f) addresses criteria for "total disability," while the identity of the compensable disease and disease causation are addressed elsewhere. *See* 30 U.S.C. §§ 902(b), 921(c).[37] The meaning of section 902(f)(2) must be harmonized with all other provisions of the Act. This is enough to justify resort to the legislative history, if the inherently imprecise term "criteria" does not do so on its own accord.[38] *See INS* v. *Cardoza-Fonseca*, 107 S. Ct.

37. Regulatory authority to define "total disability" appears only in section 902(f). Regulatory authority addressing disease causation and diagnosis is conferred in 30 U.S.C. §§ 923(b), 932(h), 936(a).

38. Indeed, the broadest construction of "criteria" in section 902(f)(2) does not limit the term to regulations, but would encompass all sources employed in SSA adjudications, including program bulletins, manuals, SSA rulings, and internal operating procedures. Not only would it be impossible to reconstruct all of these "criteria," but it also would be manifestly unjust to require mine operators to litigate questionable claims in a setting that does not contemplate true adversity. *Cf. Richardson* v. *Perales*, 402 U.S. 389, 403 (1971).

1207, 1221 & n.30 (1987). The lack of clarity in section 410.490 as well as the probability that the rule itself violates the statute, *see* 30 U.S.C. §§901(a), 902(f)(1)(A), 923(b), merit resort to external sources.

The Secretary's interpretation should be upheld so long as it is rational and consistent with the statute. *NLRB* v. *United Food & Commercial Workers Union*, 108 S. Ct. 413, 421 (1987). The Secretary's ten-year rule and full rebuttal format pass muster on both accounts. *Cf. Mullins Coal*, 108 S. Ct. at 440. All relevant considerations support this conclusion. With respect to the rebuttal provisions of section 727.203, the legislative history is quite clear. It directs the Secretary of Labor to terminate SSA's practice of ignoring evidence unfavorable to claimants and write a rule providing for rebuttal of presumed facts. *See supra* pp. 9-10. No less is conscionable in an adversarial proceeding.

The Secretary's uniform ten-year rule for invocation is validated by the evolution of the statutory language and intent from 1973-1978, the course of the debate over these years, specific references to "medical" criteria in the statements of key members of Congress, the scientific proof amassed by Congress demonstrating no evidence of totally disabling pneumoconiosis in short-term miners, and the Labor Department's intimate involvement in the legislative process through the terms of three congresses. If no one indicia is ultimately persuasive, the five in concert are determinative.

In addition, the Secretary's rule was submitted for approval and was approved by the most vigorous congressional advocates of a generous program—the very same members who led the movement to have Labor apply an interim presumption. The rule was contemporary with enactment, and its provisions were consistently and invariably applied by the agency. *See United States* v. *National Association of Securities Dealers*, 422 U.S.

694, 719 (1975). The Department participated in the drafting of the Act. *See Miller* v. *Youakim*, 440 U.S. 125, 144 (1979). And in the course of comprehensive reviews in 1980 and 1981,[39] including a careful reconsideration of benefit eligibility standards, not only did Congress fail to find fault with Labor's usage, but none of the many interested constituencies that testified found cause to criticize it. *See United States* v. *Rutherford*, 442 U.S. 544, 554 & n.10 (1979).

In sum, all traditional canons of interpretation and deference support the Secretary's rule. Conclusions to the contrary reached by the courts below are impressionistic at best and assume, incorrectly, that in the case of a rule like section 727.203, the agency's long-standing and consistent view and contemporaneous understanding of its mission are entitled to little consideration. The rule should be sustained.

D. Section 410.490 Cannot be Applied to Impose Liability on Coal Mine Owners Under the Due Process Clause of the Fifth Amendment

It is one thing for the Government to compensate miners from federal funds as a matter of congressional policy, but it is a far different thing to "take" compensation from a mine owner without a reasonable basis for imposing such liability. Presumptions pass constitutional muster if there is "some rational connection between the fact proved and the ultimate fact presumed." *Mullins Coal*, 108 S. Ct. at 440 n.32 (quoting *Mobile, Jackson & Kansas City R.R. Co.* v. *Turnipseed*, 219 U.S. 35, 43 (1910)). The test is assuredly an easy one to meet, requiring the invalidation of a presumption only if it is found to be "purely arbitrary." *Usery*, 428 U.S. at 30. In *Usery*, the statutory presumptions requiring ten or fifteen years of coal mine employment were easily sustained under this standard. SSA's rule and, if read according

39. *See 1981 Oversight Hearings, supra* note 3; *Report and Recommendation of the Subcomm. on Oversight of the Comm. on Ways and Means, U.S. House of Representatives on Black Lung Disability Trust Fund*, 97th Cong., 1st Sess. (1981).

to *Broyles*, its statutory predicate in 30 U.S.C. § 902(f)(2) are not so easily disposed of under this traditional test.

SSA's rule is invoked by chest x-ray, autopsy or biopsy evidence showing any stage, including the most minimal stage of black lung disease, or by ventilatory studies meeting specified values. Once invoked, it presumes that the miner is totally disabled or died due to black lung disease. 20 C.F.R. § 410.490(b). This presumption can only be rebutted by proof that the miner is working or able to work. *Broyles*, 824 F.2d at 329. Rebuttal is precluded if the miner is unable to work because of non-occupational conditions, such as a back injury, cigarette smokers' bronchitis, *York* v. *Benefits Review Board*, 819 F.2d 134 (6th Cir. 1987), a stroke, *Roberts* v. *Benefits Review Board*, 822 F.2d 636 (6th Cir. 1987), or nothing in particular, *see Adkins* v. *Department of Labor*, 824 F.2d 287 (4th Cir. 1987).[40] Under the *Usery* test, the results here are constitutionally permissible only if the facts proven bear some relationship to the ultimate conclusions dictated by the presumption. They clearly do not.

Under the Due Process Clause, section 410.490 may be sustained as applied to mine owners as a rebuttable presumption if the rational connection test is satisfied, or it may be sustained as an irrebuttable presumption so long as it is not "wholly unreasonable" or "irrational." *Usery*, 428 U.S. at 23-26. Section 410.490 fails both tests. Either inquiry turns on the operation and effect of section 410.490. *Id.* at 24.

The SSA rule presumes total disability based on proof of simple pneumoconiosis. A positive chest x-ray is not conclusive proof of pneumoconiosis much less occupationally caused disability. *See supra* note 24. A positive chest x-ray that shows occupationally induced disease at its early stages does not suggest that the miner is disabled or even impaired. *Usery*, 428 U.S. at 7. For

40. These cases were decided under 20 C.F.R. § 727.203(b)(2), which is the equivalent of 20 C.F.R. § 410.490(c)(2). In Labor's rule, the rebuttal inquiry can move on to address whether pneumoconiosis contributed to the miner's disability or death, or whether the miner has pneumoconiosis. 20 C.F.R. § 727.203(b)(3), (4). Under SSA's rule, the road ends after it is established that the miner is not working or able to work.

a miner with fewer than ten years of exposure, uncontradicted proof presented to Congress showed that disabling occupational disease is virtually impossible. *See supra* note 35.

More significantly, with respect to ventilatory test invocation, the uncontradicted testimony received by Congress from government physicians, the American Lung Association, the American Thoracic Society, and the American College of Chest Physicians demonstrates that the ventilatory test criteria are basically normal values for retired coal miners.[41] *See supra* p.23. The science of the matter is not arguable.[42] Moreover, ventilatory test results measure impairment only and are not in any sense diagnostic of occupational disease.[43]

Thus, under SSA's rule, a miner without impairment or disease may be presumed to be totally disabled due to occupational disease, and the presumed facts may be rebutted only if the miner is working or able to work. If the miner is unable to work because of a non-occupational ailment, rebuttal of SSA's rule is precluded. *See Haywood* v. *Secretary of HHS*, 699 F.2d 277, 283, 285 (6th Cir. 1983).[44]

If viewed as a rebuttable presumption, section 410.490 presumes that a person who either has no disease or minimal disease, or who has no true impairment much less a totally disabling impairment, is totally disabled by occupational disease. Were the presumed facts rebuttable, as they are under section

41. During the notice and comment period on Labor's rule, Dr. Ross Kory, the scientist who did the basic research for the U.S. Army from which the ventilatory values were derived, wrote: "It is difficult for me to understand how any honest, knowledgeable, responsible scientific physician could be a party to such unscientific and invalid standards, no matter how compassionate their intent . . . ." Letter from Ross C. Kory, M.D., Professor of Medicine, University of South Florida College of Medicine, to Robert B. Dorsey, U.S. Department of Labor (June 25, 1978).

42. Those who testified in favor of the criteria did so purely from a policy perspective. *See* H.R. Rep. No. 151, *supra* note 12, at 80-84, 94-96 (minority views and separate views of Rep. Erlenborn).

43. A. Miller, *Pulmonary Function Tests in Clinical and Occupational Lung Disease* 4-5 (1986).

44. The Sixth Circuit does not apply the *Haywood* Part B standard in cases arising under section 727.203. *Ramey*, 755 F.2d at 490.

727.203, there would be no valid due process objection. *See Lavine* v. *Milne*, 424 U.S. 577, 585 (1976). But the presumed facts are not rebuttable. There is no rational connection between normal ventilatory tests and the fact that a miner is not working or unable to work because of a back injury, for example.[45] There is no rational basis for imposing liability on a mine owner in the case of a short-term miner on account of an x-ray showing trivial disease, likely to have no effect on the miner's life or on the miner's survivors. *See Usery*, 428 U.S. at 26. There is no rational basis for imposing liability on a mine owner for events in the miner's life causing a termination of coal mine employment (including retirement or old age) in which the mine owner played no role. If section 410.490 is viewed as a rebuttable presumption, the connection between the facts proven and those that are actually presumed is invisible. *See Developments in the Law: Toxic Waste Litigation*, 99 Harv. L. Rev. 1458, 1643 (1986).

If SSA's rule is tested as a mandatory inference, the question is whether it is minimally rational to require employers to pay benefits to miners with largely normal pulmonary capabilities or minimal evidence of possible occupational disease, because they are not working, or cannot work, for whatever reason. The prior employment relationship coupled with some trivial impairment of health might satisfy the test of reason,[46] but the equivalence breaks down where the truth, if known, would show that the impairment was not in any way caused by the party obligated to

45. It is conceded, of course, that some claimants will invoke the presumption with truly abnormal ventilatory status or significant x-ray evidence, but even in those cases, on an individual level, reason fails to support the presumption if the claim defendant is prohibited from proving that the abnormal test results are totally unrelated to mining exposure, as is often the case.

46. In *Usery*, this Court sustained the irrebuttable rule of entitlement in section 411(c)(3) of the Act, 30 U.S.C. § 921(c)(3), on the grounds that impairment of health alone could sustain the provision. 428 U.S. at 23. But that provision compensates only those who have "complicated" pneumoconiosis, a manifestation of the disease that is indisputably severe and sometimes fatal. Section 411(c)(3) is supported by congressional findings of the seriousness of this stage of the disease. There are no findings that reason out the basis for the mandatory compensation of a health abnormality of no particular consequence to the person affected.

pay. That makes the truth irrelevant as a matter of law.[47] Facts proven by the methods prescribed in SSA's rule have little or, most likely, no connection with totally disabling pneumoconiosis.

This Court has observed that the validity of evidentiary devices under the Due Process Clause depends "on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the fact finders' freedom to assess the evidence independently." *County Court* v. *Allen*, 442 U.S. 140, 156 (1979). Under SSA's rule, the basic and elemental facts are largely unrelated and the fact finder has no freedom to assess relevant evidence.[48] If SSA's rule is applied in cases involving an employer's liability, it makes the mine owner the primary insurer of a miner's unemployment, general disability, or death, without the necessary connection between the employment relationship and the obligation imposed. For mine owners, SSA's rule compels liability without due process of law.

47. In 1980, the Comptroller General informed Congress that "in 88.5% of the cases [awarded under the SSA rule], medical evidence was not adequate to establish disability or death from black lung." Comptroller General of the U.S., *Report to the Congress: Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability* 8 (1980).

48. *Broyles* is exemplary. Broyles has heart disease. The ALJ also found that Broyles has the earliest possible stage of pneumoconiosis, which one physician attributed to his five years of coal mine work. Under section 410.490, the presumption was invoked. The ventilatory and blood gas testing is largely normal. The below normal results on certain aspects of the tests were attributed by the physicians to either invalid testing or poor cooperation. Another physician commented on the relative severity of Broyles' lung disease and heart disease, concluding that his heart disease alone is disabling and his black lung disease is not (Broyles App. 12a-14a). Both physicians agreed that Broyles is disabled by significant arteriosclerotic heart disease. Under SSA's rule, as the Fourth Circuit correctly notes, the ALJ simply may not consider the uncontradicted evidence that Broyles is not within the eligibility parameters of the statute. Under section 410.490, Broyles must be awarded benefits for his nonoccupational heart disease.

II.

THE EIGHTH CIRCUIT HAS NO AUTHORITY TO MANDATE THE RELITIGATION OF TENS OF THOUSANDS OF PREVIOUSLY DENIED AND CLOSED CLAIMS

A. Longshore Act Procedures Apply

Following disruptive litigation in 1976 and 1977,[49] Congress reaffirmed its intent that all Part C claims are to be adjudicated under the Longshore Act. 33 U.S.C. §§ 919, 921, *incorporated into* 30 U.S.C. § 932(a).[50] In accordance with Longshore Act procedures and agency rules, Part C claims are filed with a Department of Labor deputy commissioner. Procedures provide the claimant with several opportunities to prove entitlement. If initial submissions do not justify an award, the claimant is afforded sixty days to submit more evidence or request a hearing. 20 C.F.R. § 725.410(c). If no action is taken with sixty days from the notice, the claim is denied by reason of abandonment. *Id.* If the claim is pursued, the mine operator becomes actively involved, *id.* §§ 725.412-.415, and after consideration of a more complete record, the deputy commissioner issues a proposed decision and order, *id.* § 725.418. The parties have thirty days to respond and may accept the decision, request further informal proceedings or an APA hearing. *Id.* § 725.419. If there is no response in the period allowed, the proposed decision and order becomes final. *Id.*; 33 U.S.C. § 921(a).

If requested by a party, the case is forwarded to an ALJ for an APA hearing. 33 U.S.C. § 919(d), *incorporated into* 30 U.S.C. § 932(a); 20 C.F.R. § 725.455. "There shall be no right to a hearing in a claim with respect to which a determination of a claim made by the deputy commissioner has become final and effective in accordance with this part." 20 C.F.R. § 725.450. The hearing is de novo and on the record. After hearing, the ALJ

49. *See, e.g., Director, Office of Workers' Compensation Programs* v. *Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977).

50. *See* H.R. Rep. No. 864, *supra* p. 10, at 23.

issues a decision awarding or denying benefits. The decision is filed and becomes final thirty days thereafter unless appealed. 33 U.S.C. § 921(a). Appeals are taken to the Benefits Review Board and then to the circuit courts. 33 U.S.C. § 921(b), (c).

Any claimant whose claim was denied may seek a readjudication within one year from the date of the denial by proving either a mistake of fact or a change in conditions. 33 U.S.C. § 922; *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). While the passage of more than one year from a denial of a claim extinguishes that cause of action, a denied claimant may begin a new cause of action by filing an entirely new claim and proving a "material" change in conditions.[51] 20 C.F.R. § 725.309(c), (d).

Section 21(e) of the Longshore Act provides that "proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, *shall not be instituted otherwise as provided in this section*, and section 18." 33 U.S.C. § 921(e) (emphasis added).[52] Many of the cases in the *Sebben* class were denied by a deputy commissioner, many were denied by an ALJ, and the remainder were finally denied by the Benefits Review Board or a circuit court. These cases do not present the circumstances necessary to invoke district court jurisdiction as provided by section 21(e) of the Longshore Act.

51. The new claim is, of course, adjudicated under eligibility criteria applicable on the date of its filing. 20 C.F.R. §§ 718.1, 718.2. Thus, all claimants within the *Sebben* class may file a new claim at this time if there has been a material change in conditions since denial of a prior claim, but the new claim would not be considered under the Department of Labor interim presumption. No interim presumption may apply in any claim filed after March 31, 1980. 20 C.F.R. § 718.2.

52. Section 21(d) of the Longshore Act authorizes a district court to enforce compliance with a final order "[i]f the court determines that the order was made and served in accordance with law . . . ." Section 18 of the Longshore Act authorizes a district court to enter a default judgment against an employer that has refused to pay an award. Neither section 18 nor 21(d) permits the district court to disturb the order itself.

B. The Longshore Act Bars the Relitigation of Closed Claims

Where Congress establishes comprehensive statutory review procedures governing the litigation of a particular subject matter, "those procedures are to be exclusive," even if Congress has not said so. *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965). Longshore procedures are comprehensive and complete.[53] Congress has expressly provided that they shall be exclusive. 33 U.S.C. § 921(e). This Court has recognized that the Longshore Act scheme divests the district courts of the traditional bases for jurisdiction in matters arising under it. *Crowell* v. *Benson*, 285 U.S. 22, 46-47, 50-53 (1932).[54]

The circuit courts have consistently and, before *Sebben*, uniformly held that the district courts have no jurisdiction to consider Part C claims issues.[55] Further, the circuit courts have consistently held that the Longshore Act's time limitations are

53. All privately funded workers' compensation programs administered by the Department of Labor are governed by the Longshore Act. In addition to the Longshore Act and the Black Lung Benefits Act, these include the Defense Base Act, 42 U.S.C. § 1651; the War Hazards Compensation Act, 42 U.S.C. §§ 1701-1717; the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331; the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171; the District of Columbia Workers' Compensation Act, for claims filed prior to July 1, 1980. 36 D.C. Code §§ 501-504 (1973 ed.) (repealed).

54. Although Longshore procedures have changed since *Crowell*, the principle announced there has ever greater force today. In a recent unpublished opinion, the District of Columbia Circuit observed, "In 1972, however, Congress amended 33 U.S.C. § 921 to specifically remove district court jurisdiction, create the Benefits Review Board, and to provide for direct review of final Board orders in the court of appeals . . . ." *Lumberman's Mutual Casualty Co.* v. *Brock*, No. 86-5718, slip op. at 5 (D.C. Cir. Mar. 24, 1987) (unpublished). *See City of Rochester* v. *Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979).

55. *See Connors* v. *Tremont Mining Co.*, 835 F.2d 1028 (3rd Cir. 1987) (Longshore Act precludes federal question jurisdiction under 28 U.S.C. § 1331, and under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461); *Louisville and Nashville R.R. Co.* v. *Donovan*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) (Longshore Act precludes jurisdiction under 28 U.S.C. §§ 1301, 1337, and 1361); *Compensation Dep't of Dist. Five, United Mine Workers of America* v. *Marshall*, 667 F.2d 336 (3d Cir. 1981) (Longshore Act precludes jurisdiction under 28 U.S.C. §§ 1331, 1361 and 5 U.S.C. § 702).

jurisdictional and may not be waived for any reason.[56] The Iowa district court was correct in holding that it had no jurisdiction to intrude. The Eighth Circuit has violated the express mandate of the statute in holding to the contrary.

The Eighth Circuit did so solely on the authority of this Court's decision in *Bowen* v. *City of New York*, 106 S. Ct. 2022 (1986). *Bowen* is not analogous. There, SSA denied disability insurance claims under a "clandestine" policy that conflicted with applicable regulations as well as the plain language of the Social Security Act. Persons affected were, as a result of the internal policy, deprived of the ability to fairly prove their claims or appeal denials in response to the policy. The lower court directed SSA to reopen and readjudicate claims denied under the secret policy. This Court noted that the time limits imposed under the Social Security Act for the exhaustion of administrative remedies are waivable, not jurisdictional, periods of limitation. Indeed, the Social Security Act so provides. 42 U.S.C. § 405(g). Because of the obvious unfairness of SSA's policy, this Court concluded that for some SSA claimants in the class, an equitable tolling of the SSA time limitations was justified and, for others, lifting the exhaustion requirement was appropriate. *Bowen* v. *City of New York*, 106 S. Ct. at 2031-32.

Although the Social Security Act authorizes a waiver of time limitations, the Longshore Act does not. Section 21(a) of the Longshore Act provides that "[a] compensation order shall become effective when filed in the office of the deputy commissioner . . . and, unless proceedings for the suspension or setting

56. *See Arch Mineral Corp.* v. *Director, Office of Workers' Compensation Programs*, 798 F.2d 215 (7th Cir. 1986); *Midland Insurance Co.* v. *Adam*, 781 F.2d 526 (6th Cir. 1985); *Dawe* v. *Old Ben Coal Co.*,754 F.2d 225 (7th Cir. 1985); *Clay* v. *Director, Office of Workers' Compensation Programs*, 748 F.2d 501 (8th Cir. 1984); *Bennett* v. *Director, Office of Workers' Compensation Programs*, 717 F.2d 1167 (7th Cir. 1983); *Wellman* v. *Director, Office of Workers' Compensation Programs*, 706 F.2d 191 (6th Cir. 1983); *Insurance Company of North America* v. *Gee*, 702 F.2d 411 (2d Cir. 1983); *Blevins* v. *Director, Office of Workers' Compensation Programs*, 683 F.2d 139 (6th Cir. 1982); *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35 (2d Cir. 1976), *aff'd on other grounds sub nom. Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 244 (1977).

aside of such order are instituted as provided in subdivision (b) of this section, *shall become final at the expiration of the thirtieth day thereafter*." 33 U.S.C. § 921(a) (emphasis added). This provision does not permit a waiver of the time limitations. Its language is mandatory. Similarly, section 21(c) cuts the district courts out of the proceedings and reflects the jurisdictional nature of the time limitations on a party's access to the courts. 33 U.S.C. § 921(c). It provides that a party dissatisfied with an order of the Board may obtain review in the circuit court "by filing in such court within sixty days a written petition praying that the order be modified or set aside" and *"[u]pon such filing, the court shall have jurisdiction of the proceeding."* *Id.* (emphasis added).

There is no language in these provisions that allows equitable waiver. The Eighth Circuit overlooks this point and assumes that the principle of *Bowen* v. *City of New York* is freely applicable outside the Social Security Act. *Bowen* suggests no such conclusion. As a matter of sound judicial policy, the freewheeling waiver of jurisdictional limitations is wholly incompatible with the rights of the private parties obligated to pay benefits in black lung or longshore claims. *See Crowell*, 285 U.S. at 47. In *Crowell*, this Court observed:

> The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficacy of the [compensation] plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent, and consequences of the employee's injuries and the amount of compensation that should be awarded.
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Id.

The Black Lung/Longshore scheme presented here stands in stark contrast to that reviewed in *Bowen*. Section 21(e) of the Longshore Act precludes traditional bases for district court jurisdiction outside of prescribed statutory procedures. Section 21(e) is not an exhaustion provision; it is a prohibition that the

Eighth Circuit clearly violated in *Sebben*. Even if it were possible to overcome the jurisdictional prohibition of section 21(e), or to find a basis for waiver of exhaustion requirements, the Pittston Coal Group and co-petitioners do not waive exhaustion in those claims involving their potential liabilities. It would, at this late date, be impossible to defend many of those claims.

Were this Court to find statutory comparability between the Longshore Act and the Social Security Act, the circumstances presented here are not at all similar to those in *Bowen* v. *City of New York*. Nothing was hidden in the Labor Department's promulgation of section 727.203. It is a published rule and was the subject of extensive notice and comment. Its ten-year requirement is not ambiguous. Any claimant with fewer than ten years of coal mine employment had ample opportunity either to challenge the requirement[57] or to prove eligibility by alternative means. 20 C.F.R. § 727.203(d); *see also Carozza* v. *United States Steel Corp.*, 727 F.2d 74, 77 (3d Cir. 1984). The fact that any particular claimant failed to pursue these avenues is in no way the responsibility of the Labor Department and does not justify the exceptionally onerous consequences of *Sebben* for mine owners, state insurance funds, or commercial insurers.

C. The *Sebben* Claims Are Also Barred By Res Judicata

The Longshore Act establishes a principle of finality of decision that has been recognized by this Court. *Crowell*, 285 U.S. at 47-58. This principle is dispositive of this case. The Eighth Circuit ignored this principle and erred in doing so. Res judicata also should be applied to accomplish a just result.

"There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*'." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981) (citation omitted). Res judicata applies to the actions of administrative agencies if (1) the agency is acting

57. The Benefits Review Board first addressed the issue in 1981 in *Lynn* v. *Director, Office of Workers' Compensation Programs*, 3 Black Lung Reporter (MB) 1-125 (Benefits Review Board 1981), and presumably ALJs were presented with the question well before that.

in a judicial capacity, (2) the agency properly resolves disputed issues of fact, and (3) the parties have had an adequate opportunity to litigate. *University of Tennessee* v. *Elliott*, 106 S. Ct. 3220, 3226 (1986); *see also United States* v. *Utah Constr. and Mining Co.*, 384 U.S. 394, 421-422 (1966). The treatises are in accord.[58] *See* 4 K. Davis, Administrative Law Treatise § 21.9, at 78 (2d ed. 1983); Restatement (Second) of Judgments § 83, at 269 (1982).

In black lung claims there is no doubt that the agency is acting in a judicial capacity. As to the previously denied claims in the *Sebben* class, there is no suggestion that the agency failed to resolve disputed facts or failed to provide the claimant an adequate opportunity to litigate. Each claimant in the *Sebben* class had more than ample opportunity to prove the existence of total disability or death due to black lung disease. Each failed in that proof, many before ALJs and on appeal. Many times employer's counsel produced substantial proof of ineligibility. Many of these cases were concluded long ago. It is manifestly unfair to direct the Department of Labor and the employers simply to do it over. This is a nearly perfect administrative setting for application of the principle of res judicata, and the logic of the principle is well served here.[59]

58. The legislative history of the Administrative Procedure Act also evidences a strong policy in favor of the finality of decision. H.R. Rep. No. 1980, 79th Cong., 2d Sess., app. A at n.21 (1946), *reprinted in* Senate Comm. on the Judiciary, *Legislative History of the Administrative Procedure Act*, 79th Cong., 2d Sess. 289 (1946). "A party cannot willfully fail to exhaust his administrative remedies . . . . If he so fails he is precluded from judicial review . . . ." *Id.*

59. The Solicitor General observes in his petition for a writ of certiorari in *Sebben* that the authorities might not extend res judicata to questions of law arising in administrative litigation. Petition at 15 n.14. It does extend so far in judicial proceedings. *Moitie*, 452 U.S. at 398. Whether a claimant's eligibility for black lung benefits is a question of law or fact is debatable, but there is no reason why res judicata should be restricted to only fact determinations in an administrative proceeding. Its logic applies to the whole case. *See Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971) (regarding the retroactive application of judicial decisions altering a legal standard).

Res judicata does not apply if it "would be incompatible with a legislative policy." Restatement (Second) of Judgments § 83(4) (1982). The exception plainly does not apply. There is no legislative policy apparent in the Black Lung Act or Longshore Act evidencing an intent to permit the repeated litigation of claims. Abundant statutory language precludes this result. In a broader sense, it may be argued that there is a legislative policy directing the review of *Sebben* class claims under section 410.490. The existence of such a policy, however, is far from clear.

Congress authorized the Labor Department to write its own presumption. Congress mandated that the Labor rule was to be fully rebuttable, although SSA's was not. Congress and Labor had a constitutional duty to design a reasonable rule that at least minimally preserved a rational connection between proven and elemental facts. Although Congress required the reopening of many of these claims under 30 U.S.C. § 945, each of these was reopened and readjudicated under more liberal eligibility rules. It is highly unlikely, and indeed there is no indication, that Congress wanted further readjudications to be available as the courts refined and interpreted these new rules.

The policy favoring res judicata easily overcomes the unsubstantiated suggestion that the Act mandates relitigation whenever some new judicial interpretation gives claimants a still greater advantage. A contrary conclusion robs the fundamental principle of finality of considerable meaning and is a disruptive and troubling course upon which to begin.

D. The Mandamus Statute Neither Confers Jurisdiction on the District Court Nor Provides a Proper Remedy

The Longshore Act precludes district court jurisdiction under 28 U.S.C. § 1361. *Donovan*, 713 F.2d at 1245. One major purpose of the 1972 amendments to the Longshore Act was to terminate the procedure by which district courts reviewed the actions of the Secretary by writ of mandamus. *Director, Office of Workers' Compensation Programs* v. *Eastern Coal Corp.*, 561

F.2d 632, 638 (6th Cir. 1977). Under the Longshore Act, district courts may take jurisdiction only to enforce awards. In matters subject to the Longshore Act, there simply is no way for district courts to invoke the mandamus statute because the courts do not have any statutory basis on which to do so.[60]

Even if the district court could take jurisdiction under 28 U.S.C. § 1361, mandamus relief is inappropriate in these circumstances. *See Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984). It has long been the law that a writ of mandamus may not issue to compel agency action "[w]here judgment or discretion is reposed in an administrative agency and has by that agency been exercised." *United States ex rel. Chicago Great W.R.R. Co.* v. *ICC*, 294 U.S. 50, 60 (1935). This remedy is restricted "in the main, to situations where ministerial duties of a nondiscretionary nature are involved .... [W]here the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion." *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958). This Court has repeatedly imposed a heavy burden on a party seeking mandamus, requiring a showing of a "clear and indisputable" right to issuance. *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 108 S.Ct. 1133, 1143 (1988) (quoting *United States* v. *Duell*, 172 U.S. 576, 582 (1899)).[61]

In this case, the Secretary of Labor was instructed to write a set of regulations defining the term "total disability." 30 U.S.C. § 902(f)(1). The definition was to take into account five express restrictions, 30 U.S.C. § 902(f)(1)(A)-(D), (f)(2), and to

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60. For this same reason, class certification is improper. *See Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979).

61. The Brief of Respondents in Opposition at 21-22 suggests the standard for granting mandamus, at least in the circuits, has eased somewhat in recent years. While SSA matters appear to present occasional circumstances that are treated differently, there is no evolutionary trend diminishing the generally exceptional nature of the writ. *See Allied Chemical Corp.* v. *Diaflon, Inc.*, 449 U.S. 33, 36 (1980); *Maczko* v. *Joyce*, 814 F.2d 308, 310 (6th Cir. 1987); *Azurin* v. *vonRaab*, 803 F.2d 993, 995 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 3264 (1987).

blend into the ultimate rules at least three statutory presumptions and several statutory rules of evidence, 30 U.S.C. §§ 921(c)(1), (2), (4), 923(b). The entitlement equations settled upon by Congress emerged from a history of heated controversy and may not have reflected a clear meeting of the minds between the House and Senate. The course the Secretary had to follow was hardly free from doubt or clearly nondiscretionary. *See Chevron, U.S.A.*, 467 U.S. at 842-44. Hundreds of people representing the views of the agency, congressional committees involved, and diverse constituencies participated in both the statutory and regulatory process. Throughout this process, Labor provided key members of Congress the opportunity to specially comment on the regulatory product. Consigning virtually all this to irrelevancy, the *Sebben* court declared the Secretary of Labor's careful effort to have been misguided. It invoked mandamus powers to fashion its own regulatory product, nine years after the fact, without the jurisdiction or authority to do so.

The Act did not direct the Secretary to adopt section 410.490; the Secretary clearly had room for the exercise of discretion. The Secretary exercised this discretion to accommodate important competing interests, statutory requirements, scientific considerations, and the rights of all parties. This classic exercise of discretion is not subject to the mandamus powers of the district courts. To hold otherwise reduces the extraordinary writ of mandamus to an ordinary remedy and justifies judicial intervention into basic agency decisionmaking to a degree not contemplated within our system of governance.

CONCLUSION

The judgment of the Fourth Circuit, insofar as it holds invalid the Secretary of Labor's interim presumption, should be reversed. The judgment of the Eighth Circuit ordering the Secretary of Labor to readjudicate tens of thousands of previously denied and closed black lung claims should be reversed as well.

Respectfully submitted,

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